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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT DEANE SCHWARTZ,

Defendant and Appellant.

E047789

(Super.Ct.No. FSB047468)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie,
Judge. Affirmed.

George O. Benton, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Lilia Garcia and Peter
Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Deane Schwartz appeals from a jury conviction
for possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) He

argues the trial court erroneously denied his motion to suppress evidence (Pen. Code, § 1538.5) and his motion to dismiss one or more prior strike convictions (Pen. Code, § 1385).

FACTUAL AND PROCEDURAL BACKGROUND

At a hearing on defendant's suppression motion, the arresting officer testified he and a partner were on patrol on October 8, 2004. They were dispatched to an apartment complex regarding a "pending call" of narcotics activity. A Black male had been specifically identified as possibly selling drugs at this location. The week before, officers had been told "to keep an eye on that location because they were starting to have narcotics activity at that location."

As the officer and his partner approached the apartment complex, the overhead vehicle lights were off. The officer may have put the hazard lights on after he parked the vehicle. He could see defendant in the driveway in the front of the apartment complex walking toward the patrol car. A Black man was in close proximity to defendant, about three to four feet away. As soon as defendant saw the patrol car,¹ he turned around and began walking away from the area. While his partner went to speak to the Black man, the testifying officer followed defendant on foot as he walked down a walkway toward the back of the complex. The officer was walking at a fast pace but did not draw his weapon or order defendant to halt. He followed defendant because he suspected defendant might be involved in narcotics activity and was attempting to discard

¹ The trial court specifically found defendant made "eye contact" with the officers before he turned and walked away.

contraband. With his back to the officer, defendant stopped on his own initiative in an alcove area near some trash cans behind a garage.

As the officer approached him from behind, defendant's hand was up toward his mouth. The officer "asked [defendant] to turn around," and as he did so, the officer could see defendant was putting a cigarette in his mouth. He also noticed a brown paper bag rolled up in defendant's hand, but the officer could not see what was inside. The officer said to defendant, "Show me what's in your hand." Defendant handed him the paper, and as the officer unrolled it he found what appeared to be a methamphetamine pipe wrapped up inside it. In his experience, the officer said people typically wrap pipes used to ingest controlled substances in paper or cloth so they will not get broken. At this point, the officer told defendant to start walking back out to the front of the property. The officer advised defendant he was under arrest when they arrived back in front of the property where the officer was in plain view of his partner. Only a couple of minutes passed from the time the officer followed defendant until the arrest was made. After the arrest, the officer also found a powdery substance on defendant's person, which he believed was methamphetamine. Based on the officer's testimony, the trial court denied defendant's motion to suppress.

At trial, the officer's testimony was consistent with the statements he made during the suppression hearing. During a search of defendant's person following the arrest, the officer further testified he found a second methamphetamine pipe in defendant's right rear pocket and two baggies of what appeared to be a useable quantity of

methamphetamine. Chemical analysis confirmed the white powder was methamphetamine.

Defendant was charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) while released from custody on bail or his own recognizance (Pen. Code, § 12022.1). It was further alleged defendant had two prior convictions that qualified as strikes under Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), which also qualified as a single prior prison term within the meaning of Penal Code section 667.5, subdivision (b). A jury found defendant guilty as charged. In a bifurcated trial, the jury also found the prior conviction and on bail allegations to be true.

On January 21, 2009, defendant filed a motion to dismiss one or more of his prior strike convictions under Penal Code section 1385. On January 30, 2009, the court denied defendant's motion to dismiss. During the same hearing, the court sentenced defendant to a term of 25 years to life in state prison under the "Three Strikes" law, and a one-year consecutive term for the prior prison term enhancement. In addition, the court imposed a consecutive two-year term for the on-bail enhancement but stayed it pending the outcome of the related case.

DISCUSSION

Motion to Suppress Evidence

Defendant argues he was detained by the officer in the alcove in violation of his Fourth Amendment protection against unreasonable searches and seizures because the officer followed him based on unreliable information and/or an anonymous tip. He also

contends he was unconstitutionally detained because the circumstances the officers observed when they arrived at the scene could not be interpreted as criminal behavior. Defendant believes the officer followed him based on a mere “hunch,” rather than specific and articulable facts constituting reasonable suspicion of his involvement in narcotics activity. Because defendant contends the detention was unconstitutional, he argues any subsequent consent to search the paper bag was constitutionally invalid and the trial court should have suppressed this evidence.

Preliminarily, we must reject defendant’s argument he was unlawfully detained because the officer followed him to the alcove area based on unreliable information and/or an anonymous tip. Specifically, defendant contends the information the officer had about narcotics activity at this location was unreliable because it was not specific enough and was a week old. He also argues the pending dispatch about a Black man selling drugs at this location was unreliable because it was from an unknown source and was not supported by other details. However, defendant’s opening brief also indicates he did not object on these grounds in the trial court. Defendant presents no argument as to why his challenge to the reliability of this evidence was not waived for failure to object pursuant to Evidence Code section 353.² We therefore have not considered the possibility these reports were unreliable in our analysis.

² “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion” (Evid. Code, § 353.)

In reviewing a trial court's denial of a motion to suppress evidence, we defer to the trial court's express or implied factual findings where they are supported by substantial evidence and, based on these factual findings, we exercise our independent judgment to determine whether the search was reasonable under Fourth Amendment standards. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) To determine whether evidence must be excluded because of a Fourth Amendment violation, "we look exclusively to whether its suppression is required by the United States Constitution. [Citations.]" (*Ibid.*)

"[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. [Citation.] While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. [Citation.]" (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123.) In other words, the officer must have more than a " 'hunch' " that criminal activity is occurring. (*Id.* at pp. 123-124.)

Reasonable suspicion determinations are reviewed under a " 'totality of the circumstances' " standard to see whether the officer can articulate a " 'particularized and objective basis' " for suspecting a crime is being committed. (*U.S. v. Arvizu* (2002) 534 U.S. 266, 273-274.) "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.]" (*Id.* at p. 273.) "[N]ervous, evasive behavior is a pertinent factor in determining

reasonable suspicion. [Citations.]” (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124.)

“[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. [Citation.] And any ‘refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.’ [Citation.] But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.” (*Id.* at p. 125.)

Here, we agree with the trial court’s determination that the officer had reasonable suspicion to carry out a brief investigatory stop of defendant. The officer had eight years of experience as a police officer and specific training and experience in the investigation of narcotics. There was reasonable suspicion of narcotics activity based on general information about the location received the week before. The officers were specifically dispatched to the location based on a pending report of a Black man possibly selling drugs there. A narcotics sale presumes more than one person is involved. When the officers arrived at the location, defendant was in close proximity to a Black man, made eye contact with the officers, and then turned and walked in the other direction. In other words, the circumstances the testifying officer observed at the scene were very consistent with the prior reports of narcotics activity. The officer was entitled to view defendant’s conduct as nervous and evasive and to follow defendant for the purpose of making an

investigatory stop to confirm or dispel his suspicion. Although defendant stopped walking on his own initiative in the alcove area, he was indeed lawfully detained when the officer asked him to turn around. At that point, it is unlikely a reasonable person in defendant's position would have believed he was simply free to walk away.

Based on the foregoing, we reject defendant's claim he was unreasonably detained in violation of the Fourth Amendment. Because the detention was lawful, we also reject defendant's argument that an illegal detention vitiated any subsequent consent to search the paper bag he was carrying.

Alternatively, defendant argues he did not voluntarily consent to a search of the paper bag he was carrying when he gave it to the officer after the officer asked him, "Show me what's in your hand." Rather, he contends the evidence shows he involuntarily gave the paper bag to the officer. To support this contention, defendant cites testimony indicating he walked away in order to avoid an encounter with the police, but then found himself alone in the alcove with an armed officer. Based on these circumstances, he believed he was required to give the bag to the officer for a search based on the officer's authority over him. The trial court found "defendant's conduct was consensual."

"[A] search authorized by consent is wholly valid," (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222) because consent is one of the "specifically established exceptions to the requirements of both a warrant and probable cause. . . . [Citations.]" (*Id.* at p. 219.) To be voluntary, consent cannot be "coerced, by explicit or implicit means, by implied threat or covert force." (*Id.* at p. 228.) The prosecution bears "the

burden of proving that the consent was, in fact, freely and voluntarily given.’

[Citations.]” (*Id.* at p. 222.) “While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.” (*Id.* at p. 227.) Nor is it always necessary for police officers to inform citizens of their right to refuse to consent. Whether consent was voluntary “is a question of fact to be determined from the totality of all the circumstances.” (*Ibid.*)

According to the trial court, the officer’s encounter with defendant in the alcove took place at nighttime when it would have been relatively dark. For the reasons outlined above, the officer had reasonable suspicion defendant was involved in illegal narcotics activity. When the officer made contact with defendant in the alcove, he was also alone because he was “away from his partner officer.” In order to further his investigation of reported narcotics activity, as well as for reasons of safety, it was reasonable for the officer to ask, “Show me what’s in your hand.” However, nothing about the officer’s words or prior actions indicated he was commanding defendant in a coercive manner to hand over the paper bag for the purpose of a search. As the trial court observed, there were “[n]o lights, no sirens, no initial submit to authority.” “There was no testimony the officer was yelling or drew his asp or weapon [or] anything of that nature.” The officer did not order defendant to stop. Rather, defendant stopped walking on his own initiative. When the officer said, “Show me what’s in your hand,” defendant could have simply put the bag where it could be more easily seen by the officer. It is of no legal significance that the officer might then have requested consent to search the bag, which defendant

could have refused. Instead, defendant simply handed the bag to the officer. “An individual’s decision to cooperate must merely be consensual; it need not be intelligent, i.e., wise, from the criminal’s point of view.” (*People v. Bennett* (1998) 68 Cal.App.4th 396, 403, fn. 7.) Thus, based on the totality of the circumstances, we cannot disagree with the trial court’s conclusion defendant validly consented to a search of the bag that contained a methamphetamine pipe. Defendant’s motion to suppress was therefore properly denied.

Motion to Dismiss One or More Prior Strikes

Defendant contends the trial court abused its discretion when it imposed a term of 25 years to life in state prison under the Three Strikes law. He argues the trial court should have avoided sentencing him under the Three Strikes law by granting his request to reduce the current felony conviction to a misdemeanor or by granting his motion to strike one or more of his two prior strike convictions. According to defendant, a 25-year-to-life sentence under the Three Strikes law was not appropriate in his case because his two prior qualifying strike convictions were remote and were part of a single transaction. Defendant also reasons his current felony conviction is a relatively minor, nonviolent, “victimless crime”; his criminal history before and after the strike offenses was not significant; and he has demonstrated the capacity to be a productive member of society.

A trial court’s denial of a motion to dismiss or strike a prior serious and/or violent felony conviction allegation under Penal Code section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no

reasonable person could agree with it.” (*Id.* at p. 377.) A trial court deciding whether to dismiss a prior strike conviction in furtherance of justice pursuant to Penal Code section 1385, subdivision (a), “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Defendant has the burden of demonstrating an abuse of discretion, and in the absence of such a showing, we presume the trial court acted correctly. (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) There is a “‘strong presumption’ [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation.” (*In re Large* (2007) 41 Cal.4th 538, 551.) The circumstances must be “extraordinary” for a career criminal to be deemed to fall outside the scheme of the Three Strikes law. (*Carmony, supra*, 33 Cal.4th at p. 378.) A decision to strike a prior conviction remote in time is an abuse of discretion where the defendant has not led a crime-free existence since the time of his last conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

The trial court denied defendant’s motion to dismiss, because it found defendant “does fall within the spirit of the three strikes law,” because the record demonstrates “without any hesitation” that defendant “does not intend to live by the rules that society sets for him.” In our view, the trial court was wholly justified in reaching this

conclusion. The record shows defendant's present offense, prior criminal history, background, character, and prospects do not indicate he should be deemed to fall outside the spirit of the Three Strikes law.

Defendant is currently 56 years old. The probation report indicates defendant's criminal history began long ago, in 1974, when he was 21 years old. At that time, defendant was convicted of misdemeanor drunk driving. (Veh. Code, § 23102, subd. (a).) In 1976, when he was 23 years old, he was convicted of a second misdemeanor drunk driving offense. In 1990, when he was 36 years old, defendant was convicted of misdemeanor resisting a public officer. (Pen. Code, § 148.) Shortly thereafter, on December 22, 1991, he committed the two qualifying strike offenses of attempted voluntary manslaughter. (Pen. Code, §§ 664, 192.) Defendant was convicted of these strike offenses in 1994, when he was 41 years old. Defendant attempts to minimize the seriousness of these two prior strike convictions on the grounds they are remote in time and were committed during a single domestic violence incident "while he was in an agitated state." However, defendant's arguments are unconvincing. The record indicates defendant fired a fully automatic AK-47 rifle at two police officers who responded to a dispute involving domestic violence. Both officers were injured, and one of them was seriously injured. Defendant was sentenced to a total of 14 years six months in prison for these two offenses. When parole was granted, he violated it three times: June 1999; November 1999; and June 2001. Moreover, the jury in this case specifically found defendant was released on bail or his own recognizance in another case when he committed the current offense.

There is also other evidence in the record supporting the trial court's conclusion defendant is a recidivist offender who falls squarely within the Three Strikes law. For example, in 2008, after receiving a citation for property code violations, defendant wrote a four-page complaint letter to the San Bernardino City Clerk. In the letter, defendant referred to the shooting incident in 1991. His words clearly indicate he felt no remorse for firing the rifle and injuring the officers. In addition, on November 11, 2008, defendant wrote a letter to the trial court stating he lied under oath during his trial in this case when he testified the methamphetamine he possessed when arrested was not his. He also asked the court for immunity from prosecution for this transgression. Although the court did consider some mitigating circumstances in defendant's personal history, these were simply not significant enough to outweigh the factors favoring a sentence under the Three Strikes law. In other words, based on all of the information before the court at the time of sentencing, the trial court appropriately concluded defendant is a recidivist offender who has demonstrated time and again he "does not intend to live by the rules that society sets for him."

We also reject defendant's reliance on *People v. Burgos* (2004) 117 Cal.App.4th 1209 for the proposition that it was an abuse of discretion for the trial court in this case to decline to strike one of defendant's two prior strikes because they were committed as part of a single transaction. While in jail on another matter, the defendant in *Burgos* attacked and took a pair of shoes from a fellow detainee and, as a result, was convicted of second degree robbery and assault. (*Id.* at pp. 1211-1212.) He admitted he had two prior convictions for attempted robbery and attempted carjacking, which qualified as strikes.

Both of these prior convictions arose from “the same single act.” (*Id.* at p. 1216.)

Subdivision (c) of Penal Code section 215 allows the prosecutor to charge a defendant with both of these crimes, but expressly precludes punishment for both if they arose from the same act. (*Burgos*, at p. 1216.) In light of these circumstances and other supporting factors, the appellate court concluded the trial court abused its discretion when it failed to strike one of the defendant’s prior convictions. (*Id.* at pp. 1216-1217.) The other supporting factors included the defendant’s relatively insignificant criminal history aside from the strikes, and the relatively long term of 20 years to be imposed even if one of the strikes was dismissed. (*Ibid.*)

Here, defendant does not cite anything in the record suggesting his two prior convictions for attempted voluntary manslaughter were the result of a single act. As we read the record, defendant fired a rifle at two different police officers who were both injured. This does not constitute a single act, but multiple acts committed during the same course of conduct. In addition, as outlined above, the trial court’s decision not to strike one of defendant’s strikes is based on a number of other factors in the record. Therefore, this case is factually distinguishable from *Burgos*. Even if defendant could show his two prior strike convictions for attempted voluntary manslaughter are based on a single act, we do not read *Burgos* to require one of them to be stricken. Rather, we agree with the conclusion reached in *People v. Scott* (2009) 179 Cal.App.4th 920, that the connection or relative closeness between two strikes is but one in a number of factors the trial court should consider when deciding whether to exercise its discretion to strike a strike. (*Id.* at p. 931.) As we read the record and for the reasons outlined *ante*, it is clear

the nature of the prior convictions was argued and considered in the analysis, but the balance of factors simply did not weigh in defendant's favor.

In sum, under the circumstances presented, we cannot disagree with the trial court's decision to deny defendant's motion to dismiss one or more prior strikes. The record indicates there are no viable grounds upon which he could validly be deemed to fall outside the Three Strikes law.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.